seal. All judicial question, however, has been concluded on this subject also by this Court."

In conclusion, we may regard the American decisions as now pretty well harmonized on the general principle, that a sealed instrument, executed by one partner only, in the firm name, is not valid to create a new liability on the part of the other partners, unless such liability is one which the partner could have created without seal, or unless his act was previously authorized or subsequently ratified by the other partners; and that such authority or ratification may be by parol, and may be inferred by a jury from the acts of the parties or the course of the business. J. M. L.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Massachusetts.

PROVIDENCE INSTITUTION FOR SAVINGS *v.* CITY OF BOSTON.

The word "place," where the bank is located, used in the Acts of Congress, in reference to the taxation of national banks, means the *state* in which the bank is located.

The Act of Congress of Feb. 10, 1868, which prescribes that the taxation of the shares in national banks "shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens," is satisfied if the rate upon bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located.

Where the *rate* of taxation is the same for individual capital and shares of non-resident owners of national bank stock, the fact that the latter are taxed specifically, for the benefit of the state treasury, and the former for local municipal purposes, does not make the tax invalid, as in conflict with the Act of Congress.

Benjamin F. Thomas for the plaintiffs.

Charles Allen (Attorney-General) and *Clement Hugh Hill* for the defendants.

The opinion of the Court was delivered by

AMES, J.—By the terms of the Act of Congress of June 30, 1864, under which the national banks have come into existence, all the shares in each of said banks are made taxable in the place in which the bank is "located," without any regard whatever to the legal domicile of the shareholders respectively. This

provision forms a part of the organic law under which every such bank has its being, and under which the stockholders contribute to its capital. This court has recently decided (*Austin* v. *Aldermen of Boston*, 14 Allen, 359) that the word "place," as used in the statute, means the "state" within which the bank is located. And the subsequent amendatory Act of Congress (of Feb. 10, 1868) uses the following language: "The words 'the place where the bank is located and not elsewhere,' shall be construed and held to mean the state within which the bank is located; and the legislature of each state may determine and direct the manner and place of taxing all the shares of national banks located within said state, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of such state, and provided always that the shares of any national bank owned by non-residents of any state shall be taxed in the city or town where said bank is located, and not elsewhere." The legislature of this commonwealth, by the statute of 1868, chapter 349, passed June 11th of that year, entitled "An Act concerning the Taxing of Bank Shares," has undertaken to determine and direct the manner in which all the shares of stock in banks, whether of issue or not, existing by authority of the United States, shall be taxed. The act provides, among other things, that such shares owned by non-residents of this commonwealth shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere; that the tax shall be a lien on their shares; that the value of such shares shall be omitted from the valuation upon which the rate is to be based; and that the proceeds of the tax on such shares, when collected, shall be paid over by the treasurer of the town or city to the state treasurer. The plaintiffs insist that this statute, so far as it applies to non-resident stockholders, is one which the legislature had no right to enact; that the tax assessed under it upon such stockholders is invalid; and that the lien it assumes to create upon the stock cannot be enforced.

The counsel for the plaintiffs insist that three "landmarks" have been established in this broad field of inquiry, viz.: that

the shares of the stockholders of the national banks are distinct subjects of taxation; that they may be assessed and taxed without deducting from their valuation that portion of the corporate capital invested in the bonds of the United States; and last, and most important of all for the purposes of this inquiry, that the banks, being agencies of the General Government in the execution of its powers and functions, the states have no power to tax their capital, except under the permission of Congress. It is also established by statute that the shares are taxable in the place (that is to say the state) where the bank is located, and not elsewhere; that the legislature of each state may determine and direct the manner and place within such state of taxing such shares (with a restriction against oppressive and hostile taxation); and that, in the case of shares belonging to persons not residing within the state, the place of taxation shall be the city or town in which the bank is located, and not elsewhere. A citizen of Connecticut or Rhode Island, therefore, owning shares in a national bank in Massachusetts, is not to be taxed for them in Connecticut or Rhode Island. They can only be taxed in Massachusetts, a provision which relieves him of all danger of being twice taxed for the same property: *Flint* v. *Aldermen of Boston*, 99 Mass., 141. The Acts of Congress in regard to such shares belonging to non-resident stockholders apparently are intended to annul, as to them, the general rule that personal property follows the person, and has no locality other than the domicile of the owner, and to attach to such shares, for some purposes and to some extent, the local character and fixity of real estate. They are proper subjects of taxation in the town where the bank in question is located; and the legislature of the commonwealth (as the above quoted Act of Congress expressly provides that it may) has, by the statute in question, determined and directed the manner in which they shall be taxed.

If the Act of 1868, chapter 349, is to be interpreted as providing for the imposition of an excise, in the proper sense of that term, and as distinguished from a tax, it would be liable to all the objections so fully pointed out in the recent case of *Oliver* v. *Washington Mills*, 11 Allen, 268, and could not be

sustained. But the plaintiffs do not claim that it was intended to provide for an excise in the proper sense of that term. On the contrary, they insist that it is intended to authorize a tax and not an excise; that the act bears the title of an act concerning the taxation of bank shares; that "tax," and in no case "duty" or excise, is the term used throughout the statute; that the provisions for the assessment and collection are appropriate to a tax rather than to a "duty" or "excise," and are assimilated to the existing provisions of law for the assessment and collection of taxes on similar property; that the rate of taxation is required to be the same as on other moneyed capital; that the same form of expression is used in the statute and in the Acts of Congress above cited, showing that a tax on property, and not a duty or excise on the franchise, was intended to be permitted by Congress and imposed by the state; and that the statute has not been so framed that it could be held valid either as tax or an excise, whichever its true nature might be. On the assumption, then, that this argument on the part of the plaintiffs is well founded, and that the true construction of the statute is, that it is intended for taxation, and not for an excise or duty, can it be maintained as a valid exercise of power on the part of the legislature?

The objection that it conflicts with the restrictions expressly provided for by the two Acts of Congress, is one which meets us at the threshold of the inquiry, and may very properly be considered first. The power of the state to tax the shares is subject to the restriction that the tax shall not be "at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of the state." We think that this clause was obviously intended to preclude the possibility that property of that description should be singled out for special and peculiar taxation. Its operation would be to prevent oppressive and hostile discriminations unfavorable to the banks. A state, if there were no such restrictions, might so arrange its method of taxation as substantially to expel the national banks from its limits. It must be assumed that this system of banking was devised by the national legislature for national purposes, as an agency of government in the exercise of its powers

and functions, and that for public reasons it was intended that it should be general and uniform throughout the country. It might well seem reasonable to Congress to take some precaution that the banks in each state should be taxed only at the same rate and generally in the same manner as the moneyed capital of individual citizens is taxed in the same state. The language of the Act of Congress does not require the strict, literal and narrow interpretation that might be proper in the construction of a penal statute. It means merely, as we think, that such shares shall be taxed upon a general system and in compliance with a set of rules and principles applied alike throughout the state to the taxation of all moneyed capital. It means that the rate upon a thousand dollars, invested in such a bank, shall be the same as the rate upon a like sum put out at interest on good security; that as far as mere taxation is concerned, the owner of the one investment shall fare neither better nor worse than the ascertained owner of the other; that banks are not to be oppressed or incommoded, nor their operations as agencies of the General Government to be prevented or impeded by invidious and unfavorable rates, as compared with other property of the same general kind, in the same place. A strictly literal construction of the clause would lead to such results that practically it would be a matter of almost insuperable difficulty to lay any legal tax at all upon that form of investment. If the words mean that the rate is to be the lowest that is assessed upon any moneyed capital in any part of the commonwealth, one result would be, that the owners of bank stock would be assessed, in Boston for example, at less than the rate of taxation on other moneyed capital, or other property generally, owned by other residents of the same city. It may be assumed that generally the taxation in large cities will be at a higher rate than in rural and small farming towns. There would not only be one rate on bank stock, and another and higher rate on other property, but the assessors of Boston, before fixing upon the rate for bank stock, must inform themselves what is the lowest rate of taxation on moneyed capital in any one of the very many municipal bodies into which this state is subdivided. When they have obtained that information, on this construction of the Act of

Congress, they will have ascertained the maximum rate proper to be observed in the taxation of bank stock. Then suppose that Boston, on its being ascertained that the tax on money capital in some small town in the County of Berkshire, or in the County of Franklin, has been fixed at five cents on the hundred dollars of valuation, should adopt that same rate for the taxation of bank stock; and suppose it should happen that the assessors of the City of Worcester, for example, in order to be certain not to endanger the validity of their tax by adopting too high a rate, should take the precaution to fix their rate upon bank stock at four cents and nine mills on the hundred dollars, is the Boston tax to be thereby rendered illegal and void for being in conflict with the restriction contained in the Act of Congress of February 10, 1868? Why not, if the lowest rate on *any* moneyed capital is the only legal rate?

Is the tax on bank stock throughout the commonwealth to be determined and absolutely controlled by the decision of some small country village, in which there happens to be no bank, and in which the municipal wants and expenses are slight and insignificant? Yet the literal construction of the words "at a rate no greater than is assessed upon *any* other moneyed capital in the hands of individual citizens of the state," would lead to precisely this result. It is impossible to believe that such was the purpose of the act, or that such would be a reasonable and fair interpretation of its meaning. In our judgment it satisfies the meaning of the restriction, if the rate upon bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located.

Another objection, which is the one principally urged in the argument is, that the tax in controversy is not proportional. If this objection should prove to be well taken, the tax is illegal and void. It is not in the power of Congress to authorize the legislature to adopt a system which fails in so important and vital a particular. But in what way does this alleged want of fair proportion manifest itself, and in what does it consist? If we compare the case of the non-resident stockholder with those resident in the town where the bank is established, we find that they pay at exactly the same rate on their shares.

If we compare his case with individuals, citizens of the same place, owning other moneyed capital, we find that they also pay at the same rate on their respective valuations. Suppose it to be true that they all pay at a higher rate than would be charged if the shares belonging to non-residents were included in the valuations, yet, as they all pay at one uniform rate, there is no disproportion as among themselves. The rate of one town may be very different from the rate in the adjoining town; but it is not necessary, in order to meet the requirement that taxes shall be proportional, that the rate shall be identical in all the very great number of municipal corporations throughout the state. Each town determines for itself what amount of expenditure its wants require, or its valuation and local circumstances will justify; and of course the rates differ very widely in different places, yet they have never been called in question as not being proportional on account of discrepancies of that nature. We do not understand that there is any complaint that one set or class of stockholders, in banks, is taxed on a different system from the rest; or that there is any want of due proportion among the stockholders, as compared with each other, or with other individuals owning moneyed capital. The proportion, on which we understand the plaintiffs to insist as the only constitutional and legal basis on which taxes can be assessed, is that which the whole amount to be raised by taxation under the description of state, county and municipal taxes, bears to the entire amount of all the property taxable within the commonwealth. How stands the case in view of this objection?

If our statute of 1868, chapter 349, had simply provided that the tax on bank shares belonging to persons not residing within the state should be paid into the treasury of the town or city where the bank is, and should make a part of the funds of such town or city; in other words, if such shares were included in the valuation, and taxed as the real estate of non-resident owners is taxed, the case would present no difficulty, or rather the case would not have arisen. But the statute requires that the value of such shares shall be omitted from the valuation upon which the rate is to be based; and also that the taxes

upon such shares, though paid in the first instance to the treasurer of the town or city where the bank is, shall be accounted for by him to the state treasurer, and appropriated to the use of the commonwealth. The effect of the statute, then, will be that the whole amount of the state, county and town taxes (so far as they affect property and not polls), is levied upon the whole amount of all the taxable property in the state, except only the shares of non-resident stockholders in the national banks established within the state. That is to say, the whole of the property tax, falling within that classification, is imposed upon only a part of the taxable property of the commonwealth; a large part undoubtedly, but confessedly only a part. The plaintiffs claim that the rate of taxation is higher and the tax larger, to each individual tax-payer, than they would be if literally the whole of the taxable property were charged with the whole of the tax.

As we understand the argument in behalf of the plaintiffs, it may be illustrated in this manner: Suppose the whole amount of the property, which, by the terms of the statute, is to be omitted from the general valuation forming the basis of taxation, to be so large that its omission would diminish that valuation to such an extent that, in order to raise the whole amount of the taxes, it should become necessary to increase the rate of taxation from four cents on each hundred dollars to five cents. Of course these figures are here taken arbitrarily, merely for the purpose of illustration, and without any attempt to approximate the exact state of the facts. Assuming these figures, we should have the taxes upon property included in the valuation, apparently twenty per cent. higher than they would be under a system requiring the whole of the taxable property to pay the whole of the property tax. This same rate, made by the operation of the statute, as the plaintiffs insist, to stand at twenty per cent. above the true constitutional ratio and its true and legal proportions, is then imposed by the statute upon the shares belonging to non-resident owners. And the plaintiffs insist that, whatever may be the state of things among the stockholders as compared with each other, the rate and the amount both are not in that ratio to the taxable property which

alone is recognized by the constitution as the true and just proportion.

It is quite apparent that this objection, if well founded, is very far from being peculiarly applicable to the case of non-resident owners of bank stock. If the fact that the whole amount of the property taxes is levied upon less than the whole amount of the taxable property is a valid objection, it is sufficient to vitiate the whole tax. The owners of bank stock, moneyed capital, or in fact of any other description of taxable property included in the valuation, would apparently have as much reason to complain of the disproportion as the non-resident owners of bank stock. If the principle of assessment should prove to be erroneous and vicious, and prohibited by the terms of the constitution, the tax is all wrong from beginning to end, and cannot be enforced against owners of bank stock, whether resident or not resident in the state, nor in fact against any owners of property whatever.

It is true that, under the operation of the statute, a part only of the taxable property of the commonwealth is made to pay the whole of the county tax, the city and town tax, and also the whole amount of what is annually voted by the legislature specifically as the state tax, so far as these three descriptions of tax are assessed upon property and not upon polls. The money obtained from the assessment of bank stock belonging to non-resident owners does not make any part of either one of these three descriptions of tax. But although not known as the state tax *eo nomine*, it is, nevertheless, a tax for the use and benefit of the state. It goes into the public treasury, and makes a part of annual ways and means of the state. The effect of the statute, if carried out, would be to furnish the commonwealth with a regular source of income capable of making a valuable addition to the public revenue, varying perhaps somewhat from year to year, but not subject to any violent or sudden fluctuations, and generally admitting of a reasonably close estimate in advance. We are bound judicially to know the fact that the large amounts annually appropriated by the legislature for the payment of the expenses of the commonwealth, are mainly supplied by the imposition of the state tax. We

are bound also to assume that, in determining the amount of that state tax, the legislature takes into consideration all the sources of income from any other quarter which the state has at its command, including among them the tax provided for by this statute; and that the general state tax annually voted is intended to cover deficiencies of revenue, and to provide the necessary ways and means for the varying exigencies of the public service. The Acts of Congress have made certain property taxable here, which without these acts might not be so taxable. They have also authorized the legislature to determine and direct the manner of such taxation. This it has undertaken to do by a statute which provides that this new taxation shall be so managed as to enure wholly to the benefit of the state treasury, and not be applied to merely local and municipal purposes. The statute assumes that, to the stockholder not residing within the state, the appropriation of such tax is a matter of no interest or importance. It does not concern him, so long as the amount is ascertained on the same principles and the tax is assessed at the same rate as it would be if he resided in the same city or town where the bank is established.

We do not understand the plaintiffs to deny that their shares are proper subjects of taxation in Boston, or to complain that there is any disproportion in the taxation of resident and non-resident shareholders in the same place, as compared with each other. The objection is that by the operation of the statute they are made taxable at a higher rate, and so for a larger amount than they would be if they were included in the valuation upon which the rate is to depend. Is this complaint well founded? It is to be remembered that whatever amount may be added to the public revenue by the operation of the statute diminishes to exactly the same extent the amount necessary to be raised by the state tax, properly and technically so called. The annual resolve for the assessment of a state tax is what in parliamentary language is usually called a "deficiency bill." Suppose that after considering all sources of income other than taxation, the legislature should find that the sum of twelve hundred thousand dollars is needed to cover the public expendi-

tures of the state; and that the tax on bank shares, belonging to non-residents and provided for in the terms of the statute, would produce the sum of two hundred thousand dollars annually. And here it may be repeated that these figures are assumed arbitrarily, and merely as illustrative of the argument. Upon these figures a tax of one million of dollars would supply the deficiency. But if the statute were to be repealed or pronounced unconstitutional and void, and the law so far changed that the bank shares belonging to non-residents should be included in the municipal valuations, and taxed as other property of the same kind is taxed, the state would lose from its annual revenue the sum of two hundred thousand dollars. The valuations which form the basis of taxation would be increased by the addition of property producing two hundred thousand dollars in taxes annually. The county and municipal taxes, not being increased, would be assessed upon a larger amount, and of course at a lower rate; but the state tax, on the other hand, would be raised from one million to twelve hundred thousand dollars. The general result would be that the tax-payers would pay exactly what they did before, with not the slightest change of rate or proportion. In either mode of taxation, the taxable property would pay into the treasury of the state exactly the same sum, viz.: twelve hundred thousand dollars. The non-resident stockholders, as a class, do not appear then to have any cause to complain that the tax upon them as such, under our statute, is not proportional; and we find nothing in the agreed facts that distinguishes these plaintiffs from other non-resident owners generally.

There is a provision in the statute that, in assessing such shares, there shall be a deduction of a proportionate part of the value of the real estate belonging to the bank. To that extent the non-resident stockholder is privileged and favored, as there seems to be no law requiring or permitting any such allowance in favor of stockholders residing in the state. This disproportion was not alluded to in the argument; and no importance, as we suppose, was intended to be attached to it. It certainly is not one of which these plaintiffs can reasonably complain.

The conclusion, then, at which we arrive is, that the statute of 1868, chapter 349, does not transcend or conflict with the limitations expressly set forth in the Acts of Congress; that practically it produces no appreciable disproportion among tax-payers as compared with each other; that the omission of the shares of non-residents from the town valuations produces no actual want of due proportion, for the reason that the general result of the taxation, supposing the statute to be held valid, is substantially identical to each tax-payer with what it would be if the shares of non-residents were included in those valuations and taxed in the same manner in all respects as the real estate of non-resident owners is taxed; and that, although in one mode of proceeding the sum total of the valuations is less than in the other, yet the aggregate of the amount to be raised under the heads of county, municipal and state taxes, is diminished in exactly the same proportion. As to the objection that it is retrospective in its operation, it seems to be enough to say that, under the Acts of Congress, the property was certainly taxable in such lawful manner as the legislature of the commonwealth should direct. Whoever then, on the first day of May, 1868, held such property knew, or was bound to know, that it was taxable like other moneyed capital as of that day, in such manner as by law might be provided.

We do not find in the various objections taken on behalf of the plaintiffs, and so ably and forcibly urged by their learned counsel, anything that convinces us that the statute ought to be pronounced unconstitutional, or that the tax imposed in pursuance of it is unlawful and void. And, according to the terms of the agreement there must be, in each case,

Judgment for the defendant.

The foregoing opinion cannot fail to be of interest to the profession and the public. There is no subject which affects so large a proportion of the population as that of taxation, and any question affecting the taxation of shares in joint stock companies will have a very wide operation at the present day, since so large a portion of moneyed capital is invested in those companies. And the question of taxation of capital invested in the national banks is becoming one of very wide extension, and it seems to excite more interest in consequence of the enormous in-

come realized in that particular mode of investment, since men who have investments affording large returns seem proportionately less inclined to submit quietly to reasonable taxation. The owners of the most productive stocks seem to feel that taxation is the greater outrage, somewhat in proportion to the productiveness of their property. This seems to be the only satisfactory explanation of the life and death struggle maintained for some years past to exempt these shares in national banks, as far as possible, from all kinds of taxation. And the very extreme rule of exempting all agencies of the National Government not only from direct and specific state taxation, which was originally established in the Supreme Court of the United States, in *McCulloch* v. *The State of Maryland*, 4 Wheat., 316, but even from all indirect taxation of the capital invested in such agencies, by means of the valuation of the shares to the owner in common with that of the other property in the state, more recently established in that court, seems to have invited this strenuous resistance to taxation by the states, of any portion of the capital invested in the national banks. We have before sufficiently discussed that question in these pages, and we are gratified to find a manifest disposition, both in the state and national tribunals, as well as in the legislation of Congress, to allow the states reasonable scope in taxing the capital invested in national banks to the owners of such capital.

It seems obvious enough, as suggested in the foregoing opinion, that the Act of Congress, allowing the states to tax the capital invested in the national banks, and defining the mode of its imposition, has hit upon one not very just or much in analogy to the established principles of law in regard to the legal situs of personal property. The attempt is to tax the capital as such at the place of investment, instead of taxing the owner at his place of residence, the only legitimate situs of personalty for all other purposes. The owner of such shares holds them by force of the law of his domicile; he must transfer them, if at all, whether *inter vivos* or by bequest or descent, in conformity with that same law, and the more direct and natural mode of taxation would seem to be under the same law which secures its tenure and its transfer.

But there is no question, probably, that it may be done in this mode, if that is, for any reason, deemed most expedient; but it certainly violates one cardinal rule of taxation, i. e., that all similar property shall be taxed in the same mode to different owners. This is an attempt to tax one portion of the capital stock of the bank in specie, not to the bank itself, where, if anywhere, the capital exists in specie; but to the owner of the shares, not at the place where his ownership exists, but at the place where the business is carried on. It is much like taxing a non-resident partner in a business firm at the place where the business is carried on, not for the property or the business, but for his interest in the concern. It is not important, perhaps, that these analogies should be maintained always. The question is not affected by the United States Constitution securing the same rights to non-resident as to resident citizens. As the decisions of the United States Supreme Court stand, since *Weston* v. *Charleston*, 2 Peters, 449, the states have no right to tax the owner of United States

stocks, or of shares in the United States banks, in common with the other citizens of the state for similar property. We have often expressed our preference for the rule laid down by Chief Justice MARSHALL, in *McCulloch* v. *Maryland*, supra, that the prohibition of the United States Constitution against taxing its governmental instruments or agencies "does not extend to a tax paid by the real property of the bank in common with the other real property within the state, nor to a tax imposed on the *interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the state.*" And the Act of Congress allowing the states to tax capital invested in national banks, seems to proceed upon this principle. It is to be regretted that the Supreme Court could not have seen its way clear, to have adopted the doctrine of Chief Justice MARSHALL in the leading case of *McCulloch* v. *Maryland*, or rather to have *maintained* it throughout their decisions upon the same subject, since the courts could have moulded such a power with more symmetry than will be likely to result from piece-meal legislation in Congress. But this latter is better than no relief, and the evil produced and likely to ensue from the recent constructions of the Supreme Court upon the extent of the exemption of the owners of capital invested in these banks from taxation, was fast becoming intolerable, and has finally been attended with the usual results of false judicial constructions, a resort to legislation, and that, in our judgment, is the chief beneficial result of legislative interference with the general course of jurisprudence, and in that respect it is invaluable.

How far the foregoing opinion has made the state law imposing this tax upon the owners of national bank capital consistent in all respects with the Act of Congress, there will probably be some hesitation. It seems to us the opinion is drawn up with great moderation and plausibility, and that its reasoning is conclusive, unless it be upon the point of leaving the assessments of non-resident shareholders out of the valuation, and thereby, to some extent, increasing the ratio of needful taxation. The principle of the thing cannot, of course, be tested by the degree of that increase. If it is valid where it falls far below one-fifth, as put by the learned judge, it must be equally so where it exceeds one-half. We are sure the profession will be glad to read the opinion.

I. F. R.

Court of Appeals of New York.

GEO. W. MARKHAM *v.* WM. B. JAUDON ET AL.

Where a broker buys stock for a customer under an agreement to pay for and carry it, the customer to furnish and keep up a specified margin on the market value, the broker holds the stock as a pledge for his advances and commissions, and though the customer fails to keep up his margin after notice and demand, yet the broker cannot sell the stock without giving reasonable notice to the customer of the time and place of sale.